No. 22184

United States
COURT OF APPEALS
for the Ninth Circuit

JUDITH ANN LIBERIAN TRANSPORT CORPORATION, LTD., a foreign corporation,
Defendant and Third Party Plaintiff-Appellant,

v.

WAYNE CRAWFORD,
Plaintiff-Appellee,

BRADY-HAMILTON STEVEDORE COMPANY, a corporation,
Third Party Defendant-Appellee.

APPELLEE'S BRIEF

Appeal from the Final Judgment of the United States District Court for the District of Oregon

THE HONORABLE ROBERT C. BELLONI, Judge

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Appeal from the Final Judgment of the United States District Court for the District of Oregon

THE HONORABLE ROBERT C. BELLONI, Judge

STATEMENT OF JURISDICTION

This suit was commenced by Complaint filed October 4, 1966, in the United States District Court for the District of Oregon. Jurisdiction was based upon diversity of citizenship between plaintiff and defend-

ant and the requisite amount in controversy. Jurisdiction was properly invoked under 28 U.S.C., § 1332. The facts upon which jurisdiction is based are set out at page of the Pre-trial Order (R. 12).

Third Party Defendant was impleaded pursuant to Rule 114(a), Federal Rules of Civil Procedure.

Motion of Defendant for judgment n.o.v. was denied July 10, 1967 (R. 10). Notice of Appeal from such order and the entire judgment was filed August 8, 1967 (R. 95). Jurisdiction of this Court is based on 28 U.S.C. § 1291.

SUMMARY OF ARGUMENT

Judith Ann Liberian Transport Corporation, Ltd., (vesselowner) claims it is entitled to indemnity as a matter of law. It claims that either (1) furnishing a sling of a wrong type or (2) proceeding to work in the face of an unseaworthy stow requires indemnity as a matter of law without any jury question. Brady-Hamilton Stevedore Company (stevedore) has a constitutional right to a jury determination as to whether it rendered a substandard performance constituting a breach of its contract. Having a verdict in its favor, stevedore is entitled on appeal to have the evidence viewed in the light most favorable to it. Moreover, the verdict must be taken as consistent if such a view of the case is possible.

There was ample evidence upon which the jury could have rejected the claim the sling furnished was

improper. And even if it had been found to be improper, there remained the fact question of whether stevedore was unskillful or unworkmanlike in supplying it.

There was an abundance of evidence to justify a finding of unseaworthiness based upon improper stow. Given the condition of the stow, the stevedore proceeded with discharging the cargo in the only practicable method possible. The jury was amply justified in finding the stevedore did not breach its contract by proceeding with the work.

The danger was created by the vesselowner. No remedial action could have been taken by the stevedore. Stopping work could only have resulted either in a different stevedore doing the work or the cargo remaining in the vessel forever. In these circumstances the loss should fall on the vesselowner who was in the position best suited to adopt preventive measures to avoid the accident.

ARGUMENT

The main thrust of the vesselowner's argument is the assertion the stevedore is liable for indemnity as a matter of law. Vesselowner asserts the trial court should have directed a verdict against the stevedore or granted a motion for judgment n.o.v.

There were two allegations of unseaworthiness made by the plaintiff (R. 13). The verdict was general (R. 81). The vesselowner was held liable for breach of the warranty of seaworthiness either be-

cause an improper type of sling was used or because the stowage of cargo was dangerous. Vesselowner asserts that under either allegation of unseaworthiness it is entitled to indemnity as a matter of law without a factual finding by the jury. Stevedore, having a favorable jury verdict, is entitled to have the evidence viewed on appeal in the light most favorable to it. *Old Dominion Stevedoring Corp.* v. *Polskie Linie Oceaniczne,* 386 F.2d 193 (C.A. 4, 1967). The verdict must be taken as consistent if such a view of the case is possible. *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.,* 369 U.S. 355, 1962 AMC 565 (1962).

The Sling

There was ample evidence in support of the following view of the facts: Because of the manner in which the cargo was stowed, it was necessary to use a pick-up sling in the discharge of the cargo (Tr. 65, 81, 123, 148, 239). Indeed, that was the only practicable method available (Tr. 73, 123, 239). There are two types of pick-up slings. The one in general use is a relatively thin wire rope (Tr. 250). It has an eye spliced in each end. The eyes are placed over the cargo hook and the load cradled in the resulting loop (Tr. 149). It was referred to at the trial as a "cradle" sling.

The other type of pick-up sling is also of small wire rope. It has an eye in one end and a hook on the other. The eye is placed over the cargo hook. The

sling is looped around the load and the hook is hooked around the sling. The weight of the load tends to tighten the sling (Tr. 149). It was referred to as a "choker" sling.

A pick-up sling is the customary method of discharging used in similar situations and is the only practical method (Tr. 239, 240, 249). The choker sling cannot be used successfully because it tends to bind on the load and, therefore, will not perform its function of pulling under the load (Tr. 239, 240, 250, 251). The cradle sling is safer than the choker (Tr. 240).

The witnesses who testified to these facts were well qualified to do so (Tr. 237, 238, 247, 248). The jury had ample justification to conclude the stevedore company did not breach its contract in providing a cradle-type pick-up sling.

Even if the jury found the vessel unseaworthy by reason of the sling, indemnity would not have followed automatically. There was no contention or testimony that the sling was defective in any manner. It did not part or fail in service. This case, therefore, is unlike *Italia Societa per Azione* v. *Oregon Stevedore Co.*, 376 U.S. 315, 1964 AMC 1075 (1964), where the

> ". . . issue presented is whether the warranty is breached where the stevedore has nonnegligently supplied defective equipment which injures one of its employees during the course of stevedoring operations." (pp. 315, 316)

The issue here differs considerably. The considerations of care and testing of equipment cited by the court do not apply here. Unlike *Italia* where the rope was wholly unavailable to the vesselowner for inspection, in this case the agent of the vessel and the supercargo had actual knowledge of the type of sling being used (Tr. 215, 226). They had ample opportunity to stop the work if he deemed it improper, did not do so (Tr. 226, 227).

Whether a particular piece of gear is a proper tool is a question of judgment. Selection of equipment is an integral part of the selection of method of working. Method of working is a matter of skill and judgment. Skill and judgment are the essence of the stevedore's undertaking. It is a question of fact whether that undertaking is breached. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, supra. Where the stevedore furnishes equipment that fails in service *Italia* requires a finding of breach of contract per se. But where the stevedore's skill and judgment are questioned, the issue is one of fact.

Improper Stowage of Cargo

The vesselowner correctly asserts the vessel necessarily was found unseaworthy either because of the sling or the condition of cargo stowage. Again, the vesselowner assumes that if the stow was unseaworthy, the stevedore is liable for indemnity as a matter of law for proceeding with the discharge operation.

Whether or not the stevedore has breached its warranty of safe and workmanlike service again is a question of fact. *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 1962 AMC 565 (1962). The stevedore in a diversity jurisdiction case according to *Ellerman* is guaranteed a jury determination of this question by the Seventh Amendment.

There was ample testimony in support of the conclusion the vessel was unseaworthy because of a poor stow (Tr. 59-61, 76, 116, 129, 181, 182, 197, 198, 242). There was also considerable testimony as to how the stow might have been made better (ibid). Simply because there was a safer method of stowage available to the vesselowner did not render the stevedore's discharge of the poorer stow unworkmanlike per se. To so hold would be to invite poor, unsafe stowage in favor of good, safe stowage by the vesselowner. The vesselowner would thereby gain the advantage of having the stevedore be the insurer in the discharge through the vesselowner's fault. The question is whether in all the circumstances the work of the stevedore was substandard. The stowage was poor but the stevedore in this case approached the job in the only practicable manner (Tr. 73, 123, 148, 226, 227, 239, 249).

Where a winch is defective or oil is spilled on the deck it is only common sense, in most circumstances, to stop work until the dangerous situation is corrected. Even with defective winches or oil spills it is easy to imagine circumstances wherein proceed-

ing with the work could not be said to be unworkmanlike. It is a question of fact. Compare *Old Dominion Stevedoring Corp.* v. *Polskie Linie Oceaniczne*, 386 F.2d 193 (C.A. 4, 1967), where there was an obvious remedy available which made stopping work a reasonable precaution.

In the instant case there was no evidence that stopping work offered a reasonable alternative. There was no evidence that any remedy whatsoever was available to alleviate the danger arising from the method of stowage. The method of discharge employed by the stevedore was the only practicable one (Tr. 73, 123, 148, 226, 227, 239, 249). The alternative to proceeding in this manner was to leave the cargo in the vessel forever, an alternative clearly not justified by the danger to be apprehended (Tr. 87, 88, 203, 226). Or if Brady-Hamilton Stevedore did not discharge the steel, some other stevedore in Portland, Oregon, or some other port would have. Perhaps the crew would have been called upon to perform the discharging operation. (The same longshoremen who complained of the stow would, no doubt, have picketed the vessel if the crew rather than longshoremen had been employed to perform the discharge.) Somewhere, sometime, some men would have been exposed to the added hazard created by the stowage. The same type of stow and the same method of discharge are not uncommon (Tr. 87, 88, 203, 226). In all of the foregoing circumstances, the jury

was easily justified in concluding the stevedore had not breached its contract; but, in fact, it had worked safely, expertly and in a workmanlike manner.

The cases cited by the vesselowner do not justify the conclusion asserted that liability follows as a matter of law. In every case cited by the vesselowner, except one, the finder of fact found a breach of contract—a negligent or substandard service. The finder of fact in the instant case was privileged but not compelled under the applicable law to find a breach of contract. It did not do so.

Crumady v. *"Joachim Hendrik Fisser"*, 358 U.S. 423, 1959 AMC 580 (1959) is mis-cited by the vesselowner. Nothing in the facts given in *Crumady* justifies the conclusion the stevedore knew the cut-off device was improperly set for twice the safe working load of the boom. The stevedore was held negligent, not for proceeding in the face of a known danger, but for improperly positioning the head of the boom, causing undue strain on the gear. The "brought the unseaworthiness into play" language of *Crumady*, so often cited in subsequent cases, includes fault as an integral part. The stevedore was held liable not simply for bringing the unseaworthiness into play but because:

> "We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover." (p. 429).

In *Rederi A/B Nordstjernan* v. *Crescent Wharf & Warehouse Co.*, 372 F.2d 674, 1967 AMC 1036 (C.A. 9, 1967) the stevedore admitted it had breached its contract. The question was whether the conduct of the vesselowner was sufficient to preclude indemnity. That issue was not raised in the instant case. The sole issue here is whether the stevedore breached its contract. The jury found it had not.

In *Matson Terminals, Inc.* v. *Caldwell*, 354 F.2d 681, 1966 AMC 624 (C.A. 9, 1965) there is a specific finding of fact by the trial court that the stevedore breached its contract in proceeding to use a winch without ascertaining whether it had been repaired.

In *T. Smith & Son, Inc.* v. *Skibs A/S Hassel*, 362 F.2d 745, 1966 AMC 1700 (C.A. 5, 1966) there was a jury verdict against the stevedore company; necessarily a finding of fact of breach of contract.

In *Hugev* v. *Damp, Int.*, 170 F. Supp. 601, 1959 AMC 439 (S.D. Cal., 1959), Judge Mathes, sitting without a jury, specifically found that the stevedore breached its contract.

In *Simpson* v. *Royal Rotterdam Lloyd*, 225 F. Supp. 947, 1964 AMC 1171 (S.D. N.Y., 1964) the trial court found as a fact that the stevedore breached its obligation to perform in a workmanlike manner by continuing to discharge greasy tin ingots without performing, or insisting on, a thorough cleaning of them.

In *Nordeutscher Lloyd Brennan* v. *Brady-Hamil-*

ton Stevedore Company, 195 F. Supp. 680, 1961 AMC 2285 (D. Or. 1961), there was considerable testimony concerning how the stevedore might have secured crates of glass to prevent their falling over during discharge operations. The trial court found the stevedore breached its contract in failing to discharge cargo in a safe and proper manner and in being negligent.

In *Pacific Far East Line* v. *California Stevedore & Ballast Co.*, 238 F. Supp. 956 (N.D. Cal., 1965) the court found a breach of contract in continuing to work where there was known to be oil on the deck.

In *Crescent Wharf & Warehouse* v. *Compania Naviera de Baja, California*, 366 F.2d 714, 1966 AMC 2670 (C.A. 9, 1966) there was a specific finding by the trial court of negligence and breach of contract.

In *De Van* v. *Pennsylvania R. R. Co.*, 167 F. Supp. 336, 1959 AMC 426 (E.D. Pa. 1958), the trial court found a breach of warranty.

In *Mosley* v. *Cia. Mar. Adra S.A.*, 326 F.2d 118, 1966 AMC 2017 (C.A. 2, 1966), cert. denied 385 U.S. 933, 1966 AMC 2787 (1966), the jury's verdict favored the stevedore but was set aside by the trial court. In that case the entire situation constituting unseaworthiness was created solely by the stevedore company. Even so, the case is probably wrong and in conflict with *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, supra. *Mosley* even if correct, would not be controlling in the instant case.

In *Caputo* v. *U.S. Lines Company*, 311 F.2d 413, 1963 AMC 1921 (C.A. 2, 1963) was there liability fixed on the stevedore without a prior finding of fault by the trier of fact. However, that case can hardly be said to stand for the proposition that the stevedore company can be held liable without a factual determination of substandard performance. The principal issue in *Caputo* was whether the trial court in the indemnity case might make a finding inconsistent with the jury's verdict in the principal case. The Court of Appeals held it may not. The Court of Appeals then reversed with directions to enter judgment against the stevedore. The question of the propriety of doing so without a finding of fact of breach of contract was not discussed. The failure to obtain a finding of fact appears to have been overlooked rather than declared unnecessary.

Instructions

The vesselowner also complains the trial judge failed to give proper instructions as requested. Requested instruction No. 18 is printed on page 10 of vesselowner's brief and at page 66 of the Record. The court was correct in refusing the instruction. The instruction omits the essential element of breach of contract by substandard performance. As noted above (p. 6), the selection of equipment is a matter of skill and judgment. The stevedore's liability springs not from being wrong but from being unskilled, unworkmanlike or negligent. This instruc-

tion does not appear to differ from the position taken by vesselowner that it is entitled to a directed verdict. Moreover, the reference to the "condition" of the sling was misleading. The condition or state of repair was not in issue.

Requested Instruction 19 (page 10 of vesselowner's brief, page 67 of Record) is defective for the same reason—omission of the element of breach of contract by substandard performance. The portion of the instruction relating to stopping work is not applicable under the evidence since there was no evidence whatsoever that stopping work would have been a reasonable alternative. Certainly, as discussed above, it cannot be said, as the instruction reads, that liability follows as a matter of law.

Requested Instructions Nos. 21 and 22 (vesselowner's brief 11, 12, R. 69, 70) are merely restatements of Requested Instructions Nos. 18 and 19.

The various rules concerning stevedore indemnity are fashioned to place liability on the party "best situated to adopt preventive measures and thereby to reduce the likelihood of injury". *Italia Societa per Azione* v. *Oregon Stevedore Co.*, supra. Most of the cases that have come before the courts have presented fact situations in which the stevedore was "best suited to adopt preventive measures". This case graphically illustrates that the principle is not a one-way street. Here the vesselowner at the time of loading

purchased cheaper and less satisfactory dunnage (Tr. 133, 183, 220) thereby rendering the discharge hazardous. The stevedore was faced with the alternatives of (1) refusing to work, whereupon a different stevedore would no doubt have proceeded to work, or the cargo would have lain in the hold forever, or (2) proceeding with the work in the customary and only practicable manner as would any stevedore in the world (Tr. 148). Where a dangerous situation can be remedied the stevedore should do so. But the vice here was in the loading and nothing the stevedore could have done would have been remedial. The vesselowner should not be able to escape its culpability.

Special Verdict Form

The special verdict was clearly discretionary with the trial court. *Koivunen* v. *States Line*, 371 F.2d 781, 1967 AMC 2152 (1967). Circumstances here were different than in *Koivunen*. The trial court rejected the request because of the difficulties of application (Tr. 266).

CONCLUSION

The evidence in this case clearly presented questions of fact for the jury. These were properly submitted and resulted in a verdict for the stevedore. The judgment rendered on the verdict should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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